(1)

Supreme Court, U.S.
FILED

No. 01 500 JUL 30 2001

IN THE

Supreme Court of the United States

JASON ROGER BERRYHILL,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

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68 pp

QUESTIONS PRESENTED FOR REVIEW

I.

DOES ALABAMA'S "POLICY" OF HAVING NO POLICY RELATING TO THE EXPERIENCE OF APPOINTED COUNSEL IN A CAPITAL APPEAL RUN AFOUL OF AND REPUGNANT TO THE CONSTITUTIONAL PROTECTIONS MANDATED BY THE DUE PROCESS CLAUSE AND THE SIXTH AMENDMENT AS APPLIED TO THE STATES THROUGH THE FOURTEENTH?

II.

DID THE TRIAL COURT'S JURY INSTRUCTION VIOLATE THE CONSTITUTION BY PERMITTING THE JURY TO CONVICT UPON A LESSER DEGREE OF PROOF THAN THAT REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

RULE 14.1 (B) LISTING

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jason Roger Berryhill, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the Supreme Court of Alabama.

OPINIONS AND ORDERS BELOW

The order of the Circuit Court of Tuscaloosa County, Alabama is found at Appendix C. The Memorandum Opinion of the Alabama Court of Criminal Appeals appears at Appendix B. The Judgment of the Supreme Court of Alabama is reported at 2001WL470226 (Ala.) and appears at Appendix A.

JURISDICTION

The Supreme Court of Alabama entered its' judgment on May 4, 2001. This Petition was timely filed on July 30, 2001 and within ninety days of that date as provided in Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves portions of the fifth and sixth amendments to the United States Constitution, which in pertinent part provides as follows:

"No person shall be held to answer for a capital crime...nor deprived of....liberty...without due process of law..." and that;

"In all criminal prosecution, the accused shall... have the assistance of counsel for his defense."

This case also involves the State of Alabama's capital offense statute codified as Alabama Code (1975) 13A-5-54, which in pertinent part states:

"Each person indicted for an offense punishable under the provisions of this article who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years prior experience in the active practice of criminal law."

THE GROUNDS

Sought to be reviewed herein is the final Order and Judgment of the Alabama Supreme Court released and dated May 4, 2001. (Attached hereto as Appendix "A").

The questions presented in this cause invoke the jurisdiction of this Honorable Court pursuant to U.S.C. 28 Section 1257 which states:

> **"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."**

STATEMENT OF THE CASE
A
"THE FACTS"

On March 31, 1981 the Alabama Legislature passed an Act number 81-178 which was later codified and established a framework of procedures relative to "capital offenses".

Section 1(a) of the Act defines a "capital offense" as

> ***"an offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole according to the provisions of the act."*** (Alabama Code (1975) section 13A-5-39 (1), (lines are mine).

Section 16 of the Act states that:

> ***"Each person indicted for an offense punishable under the provisions of this act who is not able to afford legal counsel must be provided with court appointed counsel having no less than 5 years prior experience in the active practice of criminal law."*** (Codified as Alabama Code (1975) section 13A-5-54.)

On September 24, 1993, Mary Virginia Buck (henceforth Ms. Buck) was admitted to practice law in Alabama.

Two (2) months later (November 18, 1993) your Petitioner was indicted in the Circuit Court of Tuscaloosa County, Alabama for two (2) counts of capital murder involving the same victim.

Ms. Buck and the Honorable John A. Bivens represented the Petitioner at trial. This was Ms. Buck's first trial. Of the thirty-three witnesses presented by the State, Ms. Buck cross-examined thirteen (13).

During the trial, at least two State's witnesses testified that the Petitioner had confided in them that while attempting to rob the victim, a gun battle or shoot-out had erupted accidentally resulting in the death of the victim. At the close of evidence, the trial court offered defense counsel the charge of self-defense. The defense declined. In a post-conviction hearing, Attorney Bevins could not explain why he rejected the charge of self-defense; nor why he and Ms. Buck failed to request a charge of lesser included offenses such as manslaughter or criminally negligent homicide (a misdemeanor).

At various junctures during the trial, evidence of prior and subsequent bad acts- as well as - character evidence was elicited. Specifically, that the Petitioner was a drug user, had been arrested for possession of LSD, had jumped bail in Oklahoma, had no driver's license, and had spoke of robbing a bank.

In his charge to the jury, the Honorable Thomas Wilson made the following statement:

> ***"Now, in determining whether or not the State of Alabama has proven each and every element of these offenses beyond a***

> ***reasonable doubt, you should consider all of the evidence before you and weigh it. After doing so, if you have an abiding conviction of the truth of the charge or charges, then your are convinced beyond a reasonable doubt and it would be your duty to convict the defendant.***
>
> ***Now, the reasonable doubt which would entitle the defendant to an acquittal cannot be a mere fanciful, vague, speculative or conjectural doubt, but must be a doubt which is founded upon a substantive basis.***" (This portion of the trial transcript is attached hereto as Appendix "E")

The petitioner was convicted of two (2) counts of capital murder and sentenced in one case to life without parole.

On appeal, Ms. Buck was appointed as the Petitioner's sole counsel to prosecute his appeal. At the time of her appointment Ms. Buck had been practicing law for less than 2 years. At a post-conviction hearing, Ms. Buck could not confirm whether the Petitioner's case was her first appeal. She did, however, admit no other attorney assisted her in the preparation of the Petitioner's appeal.

In her brief on appeal, Ms. Buck failed to raise any issue pertaining to the injection of character evidence at trial, nor was an issue of ineffective assistance of counsel raised relative to trial counsel's failure to request or accept affirmative charges.

B
"THE CASE"

Jason Roger Berryhill (henceforth "Petitioner") was indicted for first degree murder during a robbery and first degree murder during a burglary on November 18, 1993.

The Petitioner was represented at trial by two attorneys, John A. Bivens and Mary Virginia Buck.

In his opening statement to the jury, the Honorable Thomas Smith (counsel for the State) made the following statement:

> ***"While he is there, for the next few days, he talks to Laura Townsend. He also talks with an Elizabeth Robbins. And he tells them that he had been to the Willcutt (victim's) trailer, that what happened was he was in there to – he was going to rob the man, steal from him, and there was some kind of shoot-out and one bullet hit him – or a bullet hit him, and it was just by accident." (R.922)***

Two witnesses for the State, Laura Townsend and Elizabeth Robbins, testified that the Petitioner had reported to them that the victim was killed during a shoot-out. Robbins testified that Berryhill told her that the "shoot-out" occurred outside the victim's trailer.

Stephanie Lee testified at trial that she had talked to the decedent prior to his murder, and that he had stated that someone was in his trailer and that he had a "nine-millimeter" and was going to blow them away. (R-14)

The Petitioner testified at trial that while he had entered the victim's trailer he had not encountered him nor did he kill him. (R.2627, 2686).

At the close of the evidence the trial court made the following statement:

> **THE COURT: "Do ya'll want a charge of self-defense?"**
>
> **MR. BIVENS:** ***"The Defense does not."***
> ***(R. 2779)***

After a charge conference the trial court, during his instruction to the jury, made the statement which follows:

> ***"Now, in determining whether or not the State of Alabama has proven each and every element of these offenses beyond a reasonable doubt, you should consider all of the evidence before you and weigh it. After doing so, if you have an abiding conviction of the truth of the charge or charges, then your are convinced beyond a reasonable doubt and it would be your duty to convict the defendant.***
>
> ***Now, the reasonable doubt which would entitle the defendant to an acquittal cannot be a mere fanciful, vague, speculative or conjectural doubt, but must be a doubt which is founded upon a substantive basis.***" (Lines are mine)
> (This portion of the trial transcript is attached hereto as Exhibit "E")

The Petitioner was convicted on two counts of capital murder on February 22, 1995. He was given one (1)

sentence of life without parole.

Counsel for the Petitioner withdrew, and Mary Virginia Buck (henceforth "Ms. Buck") was appointed solely to prosecute the Petitioner's appeal. In her brief on appeal, Ms. Buck failed to raise issues pertaining to evidence at trial of prior and subsequent bad acts, evidence of bad character, and ineffective assistance of counsel relating to the failure of trial counsel to request affirmative charges.

On June 21, 1999, the Petitioner filed a Petition for relief from his judgment of conviction (Exhibit "D"). In his Petition, Berryhill specifically alleged that the trial court had denied him Due Process of Law and Effective Assistance Of Counsel when he appointed an attorney to the Defendant for purposes of trial and appeal who possessed less than 5 years in the active practice of criminal law citing Alabama Code (1975) Section 13A-5-54 and United States Constitution of America ***(U.S.C.A.) Amendments 5,6, and 14.***

A hearing was held on December 17, 1999 before the Honorable Thomas Wilson, Judge of the Sixth Judicial Circuit (Tuscaloosa County, Alabama). During the hearing attorney Bivens admitted that the testimony concerning a gun battle as described by Laura Townsend and Elizabeth Robbins could have given rise to lesser included charges of manslaughter and criminal negligence homicide (a misdemeanor).

Mr. Bivens was at a loss to explain why he did not request or accept the affirmative charge of self-defense at trial:

> ***"I don't know of a reason why you would not pursue it under those circumstances." (R.18)***

Ms. Buck testified during the hearing that Jason Berryhill's case was her first trial (R.35) and that she had been admitted to practice September, 1993. Ms. Buck was unable to confirm whether Berryhill was her first appeal. (R. 36). She did confirm, however, that no other attorney assisted her in the preparation of the Berryhill appeal. (R.40)

In an Order (Exhibit "C") dated December 27, 1999, Judge Wilson denied the Petitioner's Petition for post-conviction relief "in all respects".

The Petitioner gave notice of appeal to the Alabama Court of Criminal Appeals. In a "Memorandum" opinion (Exhibit "B") released June 23, 2000, the Court of Appeals affirmed Judge Wilson's ruling and Order.

The petitioner timely filed a Petition for Writ of Certiorari requesting review by the Alabama Supreme Court which was granted. In an Opinion (Exhibit "A") dated May 4, 2001, the Alabama Supreme Court affirmed the findings of the Court of Criminal Appeals and held, in effect, that in Alabama capitally convicted appellants were not entitled to counsel with at least five (5) years in the active practice of law since the death penalty had not been imposed.

REASON THE WRIT SHOULD BE GRANTED
I

THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS WHETHER ALABAMA'S "POLICY" OF HAVING NO POLICY RELATING TO THE EXPERIENCE OF APPOINTED COUNSEL IN A CAPITAL APPEAL RUNS AFOUL OF AND IS REPUGNANT TO THOSE PROTECTIONS AS MANDATED BY THE DUE PROCESS CLAUSE AND THE SIXTH AMENDMENT AS APPLIED TO THE STATES THROUGH THE FOURTEENTH.

This case is about the Alabama Legislature's failure to provide indigents a meaningful appeal. It is also about the Alabama Supreme Court's failure to protect the citizenry against the Alabama Legislature. More importantly, it is about a person charged with the highest crime at law being appointed counsel with the lowest level of experience.

AMENDMENT V
UNITED STATES CONSTITUTION OF AMERICA

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without **due process of law;** nor shall private property be taken for public use, without just compensation.

AMENDMENT VI
UNITED STATES CONSTITUTION OF AMERICA

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, **and to have the assistance of counsel for his defense.**

Alabama law defines a "Capital Offense" as **"an offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole..."**.

It is without dispute that your Petitioner herein was charged with and convicted of two (2) counts of capital murder involving the same victim.

Alabama Code (1975) section 13A-5-54 provides that:

> ***"Each person indicted for an offense punishable under the provisions of this article who is not able to afford legal counsel must be provided with court appointed counsel having no less than 5 years prior experience in the active practice of criminal law."***

Most states have established standards concerning the appointment of counsel to those who are financially unable to hire an attorney. Many states have established guidelines relative to the level of experience and training a given attorney must possess before being appointed to represent

persons dependent upon the severity of the crime charged. Absent Code section **13A-5-54**, Alabama has no guidelines relating to the appointment of counsel in any case. Based upon the ruling of the Alabama Supreme Court, state judges may continue to appoint attorneys with no prior experience to represent indigents on appeal without regard to the level of the offense. Simply put, a trial judge can appoint an attorney fresh out of law school with no prior experience to represent a person charged with murder. And that is exactly what happened here.

Mary Virginia Buck left law school, passed the bar, and was admitted to practice law on **September 24, 1993.** Two months later, on **November 18, 1993**, Jason Berryhill was indicted for two counts of capital murder. Ms. Buck was appointed as one of two attorneys to represent Berryhill at trial. This was her first trial.

After his conviction, the court re-appointed Ms. Buck solely to prosecute Berryhill's appeal. No other attorney assisted, at all, in preparing the appeal. (While Ms. Buck could not confirm whether this was her first appeal as attorney of record, it is undisputed that at the time of her appointment she had practiced law for substantially less than 2 years.)

If the Alabama Supreme Court had properly interpreted **13A-5-54** by finding that that section applied to appeals, Ms. Buck would have been ***prima facia*** incompetent to have handled the Petitioner's appeal. In Alabama, the only requirement pertaining to the appointment of counsel is that the attorney is breathing.

While Ms. Buck was prima facia incompetent by statute (if one properly interpreted **13A-5-54**) to represent the

Petitioner on appeal, the fact remains that the brief submitted by Ms. Buck was deficient, ineffective, and inured to the prejudice of the Petitioner. To be sure, numerous references were made during the trial of the Petitioner which impugned his character and represented prior bad acts. (R.21, 36-38). Specifically, there were references during the trial that he used marijuana, had jumped bail in Oklahoma on drug charges, did LSD, had a suspended drivers license and spoke about robbing a bank. While counsel is at a quandary to understand how any of the foregoing could be relevant to proving capital murder, this Honorable Court is fully aware that character evidence initiated by the State is highly improper. Yet, Ms. Buck failed to cite on appeal the fact that numerous references had been made to other claims allegedly committed by the Defendant calling upon him to defend matters for which he was not standing trial. Any reasonably competent counsel who had done a modicum of criminal appeals would have had reason to know that evidence of bad character and references to prior bad acts would be important issues to cite on appeal because of the reversals on these subjects by this very court.

Even more perplexing is the fact that trial counsel failed to request a charge to the jury on self-defense (even though it was offered by the Court and declined by defense counsel) and charges for lessor included offenses. (See R. 19) During the Petitioner's trial three witnesses for the State (Laura Townsend, Elizabeth Robbins, and Stephanie Lee) testified to facts giving rise to the conclusion that a "gun battle" had taken place between the deceased and Berryhill, your Petitioner. During the Rule 32 hearing, Berryhill's prior counsel claimed that self-defense was inconsistent with the defense theory that Berryhill did not do it. (R-23) Regardless of counsel's theory there was a substantial body of evidence presented by the State which provided the factual basis for the

affirmative charge of self-defense and lesser included offenses. The defense could have simply told the jury if you do not accept our theory - accept the State's. It has been held that the label of "trial strategy" does not immunize an attorney's performance from an ineffective assistance claim. To be sure, in U. S. v. Span, 75 F.3d 1383 (9th Cir. 1996) that court stated:

> ***"It thus is clear that counsel inadvertently lost the Span's their excessive force defense by failing to request an instruction that the Span's self-defense in the face of an excessive use of force by the marshals is an affirmative defense. Moreover, they failed to request an instruction explaining an element of the offense, that excessive use of force in the pursuit of official duty is not considered a good faith performance of official duties within the definition of section 111. And counsel failed to establish a foundation for an excessive force defense, which would at least have allowed the Spans to obtain reversal on appeal. In addition, counsel failed to object to the trial court's FEOLA instruction, which had the effect of negating any excessive use of force defense that the jury could have implied from the elements of the statute because it required the jury to find that the Spans did not know Dains and Grotewold were federal officers before allowing the Spans any right of self-***

defense."

Continuing, the court said:

> ***"But the fact that counsel did not request an excessive force instruction, or lay a foundation for such an instruction, does not necessarily mean that this was a strategic decision. "The label of "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges." Patterson, 769 F. Supp. At 1110 (Quoting Kellogg v. Scurr, 741 F. 2d 1099, 1102 (8th Cir. 1984))***
> and:
> ***"We have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to deliberately omit his client's only defense, a defense that had a strong likelihood of success, and a defense that he specifically stated he had every intention of presenting." U.S. v. Span, 75 F. 3d 1383 (9th Cir. 1996).***

As previously noted, Ms. Buck was the Petitioner's singular counsel on appeal.

This Court has held that the Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on appeal. (Evitts v. Lucey, 469 U.S. 387 (1985). This court has also held that the guarantee of effective counsel **"cannot be satisfied by mere formal appointment."** (citing Avery v. Alabama, 308 U.S.

444 (1940). And the fact that **"a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command..", "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."** (Strickland v. Washington, 466 U.S. 668) (1984).

There can be little dispute that an appeal is a "critical stage" in the proceedings against an accused. Further, it can rationally be forwarded that it is just as important to have experienced counsel on appeal as it is for purposes of trial.

The question here is not whether Alabama has a duty to insure the appointment of quality representation on appeal, but rather, whether the state has any duty relating to the appointment of counsel on a capital appeal.

Petitioner asserts that Alabama "policy" of having no standards relating to the appointment of counsel on capital appeals is violative of and repugnant to the Due Process Clause of the Fourteenth Amendment

REASON THE WRIT SHOULD BE GRANTED
II

THIS COURT SHOULD GRANT CERTIORARI OR GRANT HABEAS CORPUS RELIEF SINCE THE TRIAL COURT'S CHARGE TO THE JURY PERMITTED THE JURY TO CONVICT UPON A LESSER DEGREE OF PROOF THAN THAT REQUIRED BY THE DUE PROCESS CLAUSE.

In Cage v. Louisiana, 498 U.S. 39 (1990), this court held that a jury instruction would be held unconstitutional if there was a likelihood that the jury understood it to allow a conviction without proof "beyond a reasonable doubt."

In this case, the trial court's instruction, in effect, defines the doubt necessary for an acquittal to be a substantial one; viz:

> ***Now, in determining whether or not the state of Alabama has proven each and every element of these offenses beyond a reasonable doubt, you should consider all of the evidence before you and weigh it. After doing so, if you have an abiding conviction of the truth of the charge or charges, then you are convinced beyond a reasonable doubt and it would be your duty to convict the defendant.***
>
> ***NOW, the reasonable doubt which would entitle the defendant to an acquittal cannot be a mere fanciful, vague, speculative or conjectural doubt, BUT MUST BE A***

DOUBT WHICH IS FOUNDED UPON A SUBSTANTIVE BASIS." (Lines are mine).

If one possessed a substantial or "substantive" portion of the whole this would necessarily mean more than 50%. As such, a jury could have readily inferred that the State's burden of proof was less than the preponderance or preponderate weight of the evidence, i.e.: less than that required in a civil case.

(This issue was not presented in any prior proceeding. However, Petitioner requests that the matter be resolved herein as a matter of judicial economy and hold, in effect, that Petitioners Argument numbered II be a request in the nature of Habeas Corpus. Counsel failed, inadvertently, to note this issue due to the voluminous nature of the transcripts herein exceeding 3000 pages.)

Petitioner argues that the Sixth Amendment to the Constitution does not countenance a jury verdict rendered under the instructions given here, and should deny the continued imposition of the conviction due to a lack of "subject matter" jurisdiction which may be raised at any time with leave of this Honorable Court.

Respectfully submitted,

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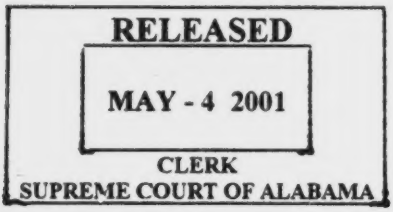
APPENDIX

APPENDIX A



SUPREME COURT OF ALABAMA

OCTOBER TERM, 1997-98

1992043

Ex parte Jason Roger Berryhill

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Jason Roger Berryhill
v.
State of Alabama)

(Tuscaloosa Circuit Court, CC-93-1562.60;
Court of Criminal Appeals, CR-99-0984)

MOORE, Chief Justice.

Jason Roger Berryhill was indicted for capital murder. The trial court appointed Mr. John A. Bivens, an attorney with over five years' experience in the practice of criminal law, and Ms. Virginia Buck, an attorney with less than five years' experience in the practice of criminal law, to represent

Berryhill at trial. A jury convicted Berryhill of capital murder, and the court sentenced him to life imprisonment without parole. Shortly thereafter, Mr. Bivens withdrew from his representation, and the trial court then appointed Ms. Buck as Berryhill's sole attorney on appeal. The Court of Criminal Appeals affirmed both the conviction and the sentence. Berryhill v. State, 726 So.2d297 (Ala. Crim. App. 1998). This Court denied the defendant's petition for certiorari review.

Berryhill later filed a petition pursuant to the Rule 32 Ala. R.Crim.P., alleging that he had had ineffective assistance of counsel on appeal. The trial court denied Berryhill's Rule 32 petition; the Court of Criminal Appeals, on June 23, 2000, affirmed that denial with an unpublished memorandum. Berryhill v. State (No. CR-99-0984), ____ So. 2d ___ (Ala.Crim. App. 2000) (table). We granted Berryhill's petition for certiorari review, pursuant to Rule 39 (c), Ala.R.App.P. We affirm the judgment of the Court of Criminal Appeals.

I.

In his certiorari petition, Berryhill raises numerous factual allegations of ineffective assistance of counsel, all of which he raised before the Court of Criminal Appeals; we have carefully considered all of them in light of the arguments, the record on appeal, and the unpublished memorandum of the Court of Criminal Appeals. We conclude that the Court of Criminal Appeals fully and correctly addressed Berryhill's factual allegations. However, the crux of Berryhill's legal argument is that it was a prima facie denial of his right to effective assistance of counsel for the court to appoint as appellate counsel a lawyer who had not had at least "five years' prior experience in the active practice of criminal law."

Section 13A-5-54, Ala. Code, 1975. We will address only this issue.

II.

The polestar of statutory construction is to ascertain and give effect to the legislature's intent in enacting a statute. Norfolk S. Ry. V. Johnson, 740 So. 2d 392, 396 (Ala. 1999). When a court construes a statute, "[w]ords used in [the] statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that a language to mean exactly what it says." IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992).

This Court has written:

"' If the statute is ambiguous or uncertain, the court may consider conditions which might arise under the provisions of the statute and examine results that will flow from giving the language in question one particular meaning...'

"In deciding between alternative meanings..., we will not only consider the results that flow from assigning one meaning over another, but will also presume that the legislature intended a rational result, one that advances the legislative purpose in adopting the legislation, that is 'workable and fair,' and that is consistent with related statutory provisions."

John Deere Co. v. Gamble, 523 So. 2d 95, 100 (Ala. 1988) (citations omitted). As we must with any statute, we read the concept of reasonableness into the provisions of the statute at issue in this case. See Bolton v. Board of School Comm'rs of Mobile County, 514 So. 2d 820, 824 (Ala. 1987).

The statute at issue in this case reads:

> "Each person indicted for an offense punishable under the provisions of this article [i.e., Title 13A, Chapter 5, Art. 2, relating to capital offenses] who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law."

Ala. Code 1975, Section 13A-5-54 (emphasis added).

The language of the statute is clear. It provides that indigent persons who are indicted for a capital offense will be provided "court appointed counsel having no less than five years' prior experience in the active practice of criminal law." The term "indictment" is defined as "an accusation in writing presented by the grand jury of the county, charging a person with an indictable offense." Ala. Code 1975, Section 15-8-1. Thus, to be eligible for appointed counsel having at least "five years' prior experience in the active practice of criminal law," a person must be: (1) indigent and (2) indicted for – i.e., charged with or accused of – a capital offense. Clearly, the Legislature, by enacting this provision, intended that an indigent defendant charged with a capital offense have experienced appointed counsel at all critical phases of the initial adjudicative process for which a defendant is entitled to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984); Gardner v. Florida, 430 U.S. 349, 358 (1977); Williams v. Turpin, 87 F. 3d 1204, at 1209 (11th Cir. 1996).

This interpretation is supported by the language of related statutes, which, construed in pari materia, clearly

indicate a legislative intent to provide experienced representation through sentencing proceedings. See Ala. Code 1975, Sections 13A-5-54 through 13A-5-47. Kirkland v. State, 529 So. 2d 1036, 1038 (Ala. Crim. App. 1988) ("When ascertaining legislative intent, statutes which are in pari materia...must be interpreted as a whole in light of the general purpose of the statute"); Burton Mfg. Co. v. State, 469 So. 2d 620, 623 (Ala. Civ. App. 1985) ("Statutes dealing with the same subject being construed (statutes in pari materia) are a form of extrinsic aid deemed relevant as to how a statute should be interpreted and applied.").

Thus, we conclude that a capital defendant is clearly entitled to the representation called for by section 13A-5-54 at all stages of the trail, including sentencing and other critical post trial proceedings. This conclusion, while logically flowing from the plain language of the statute, does not, however, end our inquiry as to when an indigent charged with a capital offense has a right to counsel under Section 13A-5-54, because Berryhill argues that even on appeal he was entitled to the experienced counsel provided by that statute.

The cardinal rule in statutory construction is to give effect to the legislative intent as clearly expressed in the statute or as may be inferred from the language used as well as from the reason for the act. McClain v. Birmingham Coca-Cola Bottling Co., 578 So. 2d 1299 (Ala. 1991). The legislative act that provided Alabama's capital-punishment provisions, Act No. 81-178, Ala. Acts 1981 (hereinafter the "Act"), provided that persons charged with certain crimes are, upon conviction, subject either to a sentence of life imprisonment without parole or to a sentence of death. Ala. Code 1975, Section 13A-5-39 et seq. The obvious reason the

Legislature required appointment of experienced counsel was to ensure that persons subject to the most severe form of punishment are provided with competent and effective representation. Simply stated, the Legislature sought to protect the rights of indigents charged with capital offenses by providing them with experienced advocates.

Historically, courts have emphasized the importance of appellate review:

> "The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to [the] appellate stage. Both stages..., although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently [overlooked]."

Penson V. Ohio, 488 U.S. 75, 85 (1988).

> "In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that – like a trial – is governed by intricate rules that to a layperson would be hopelessly forbidding."

Evitts v. Lucey, 469 U.S. 387, 396 (1985). Therefore, the constitutional right to effective assistance of counsel applies to appellate proceedings. Id., 469 U.S. at 398 (criminal defendants have constitutional rights to effective counsel during the first appeal as of right); see Williams v. Turpin, 87

F. 3d 1204, 1209 (11th Cir. 1996).

However, read in pari materia with related statutes, Section 13A-5-54 does not indicate that the Legislature intended representation called for by that statute to be required in all appeals from convictions of capital offenses. In fact, a systemic review of the Act indicates the Legislature was particularly concerned with providing experienced representation only in the context of possible or imminent application of the death sentence.

For example, the Act provides for an automatic appeal and for a stringent review of a capital case, but only if the sentence of death has been imposed. See Ala. Code 1975, Section 13A-5-53 and Section 13A-5-55. Moreover, the title to the Act specifically states that one of its purposes is "to provide for appellate review of convictions and sentences in cases in which defendants are sentenced to death." Act No. 81-178 (emphasis added). See Jordan v. Reliable Life Ins. Co., 589 So. 2d 699, 702 (Ala. 1991) ("the title of an act may serve as an aid to statutory interpretation"). In this instance, there is simply no language, either in the Act or in its history, to support Berryhill's contention that the representation called foy by Section 13A-5-54 is required in appellate proceedings following the conviction of a defendant who has not been sentenced to death.[1]

Berryhill's interpretation – if adopted – would require representation pursuant to Section 13A-5-54 for defendants sentenced to life without parole upon conviction of a capital offense, while not requiring the same representation for those convicted and sentenced to life without parole pursuant to other statutory provisions. See, e.g., the Habitual Felony offender Act, Ala. Code 1975, Section 13A-5-9. It would seem the Legislature would not have intended such an inconsistency.

Based on the plain language of Section 13A-5-54 and on the general purpose of the Act from which that Code section was taken, we conclude that the requirements of that Code section apply only to appellate representation for a defendant who has been sentenced to death, upon the first appeal as of right. We make this interpretation based upon the Court's duty to strictly interpret statutes and, at the same time, to produce a logical and rational result. Of course, if the Legislature intended a different result, then it can amend Section 13A-5-54 more clearly or more specifically define the rights of indigent defendants charged with capital offenses to experienced appointed counsel on appeal.

AFFIRMED.

Houston, See, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

Brown, J., recuses herself.

APPENDIX B

Jason Roger BERRYHILL, Appellant

v.

STATE OF ALABAMA, Appellee

No. 93-1562.60

Court of Criminal Appeals
State of Alabama

June 23, 2000.

MEMORANDUM

COBB, Judge

Jason Roger Berryhill appeals the circuit court's denial, after an evidentiary hearing, of his Rule 32, Ala. R.Crim.P., petition for postconviction relief. The petition challenged his two convictions for murder made capital because the murder occurred during a robbery and a burglary. Berryhill received one sentence of life without parole. His direct appeal was affirmed on April 18, 1997, Berryhill v. State, 726 So.2d297 (Ala.CR.App. 1998), and the certificate of judgment was issued on November 20, 1998. Berryhill filed the instant petition on June 21, 1999, which was followed by an amended petition on September 22, 1999. The state filed a motion to dismiss, a hearing was conducted, and on December 27, 1999, the circuit court entered a written order denying the petition.

Berryhill raised the following claims in both the petition and on appeal.

I.

Berryhill contends that he was denied due process of law and that the trial court committed reversible error by appointing an attorney with less than five years experience in the practice of law to represent Berryhill on appeal. Berryhill argues that Section 13A-5-54, Ala. Code 1975, mandates that an indigent person charged with a capital crime be appointed an attorney with at least 5 years experience in the active practice of law to represent him. He also argues that by enacting Section 13A-5-54, the Alabama Legislature intended to insure that a capital defendant be afforded an attorney with more experience than other felons would be entitled to. Section 13A-5-54, Ala.Code 1975 states:

> "Each person indicted for an offense punishable under the provisions of this article who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law."

The circuit court ruled as follows in this claim.

> "As to the petitioner's claim that appellate counsel had less than 5 years experience, this court finds that appellate counsel did have less than 5 years experience. This court could find no case law addressing whether or not 13A-5-54 applies to appellate counsel or whether a violation of that statute automatically carries with it an automatic right to a new appeal.

> "There is no case law holding that there is no presumption of incompetence, of counsel, and this court has already ruled that the petitioner received effective assistance of appellate counsel. The petitioner has failed to prove that he was, in any way, prejudiced by appellate counsel's lack of 5 years experience. This court takes judicial notice of appellate counsel's ability, in that, she was able to prove ineffective assistance of counsel in an murder case around this same time period, and got a murder conviction set aside in a case that had been affirmed on appeal."

C.R. 36-37.

This statute assures that indigent defendants facing the death penalty be given experienced trial counsel. Nothing in this statute contemplates that a defendant sentenced to life without parole be appointed appellate counsel having at least five years experience. An appeal is not automatic after capital conviction where the death penalty is not imposed. Thus, we agree with the State's argument that to accept Berryhill's reasoning would entitled a defendant charged with a capital offense to an attorney on appeal with five years experience even if the defendant was convicted of a lesser included offense. We do not believe that the statute is meant to apply to appeals where the death penalty has not been imposed. The statute simply does not address appellate counsel's qualifications. We will not require these qualifications where the statute is silent.

Moreover, Berryhill cites no instances of alleged ineffectiveness by appellate counsel.

The circuit court, in its written order, explained its

reason for rejecting the claim. This reason is supported by the record. Absent a clear abuse of discretion by the trial court, this court will not overturn the trial court's judgment. Hurley v. State, 568 So.2d 359 (Ala.Cr.App. 1990). No abuse of discretion is evident from the record.

II.

Berryhill contends that the circuit court abused its discretion by failing to vacate one of Berryhill's convictions for capital murder involving one victim.

Berryhill was convicted of two counts of capital murder: murder committed during the commission of first degree burglary and murder during the commission of first degree robbery. He received one sentence of life without parole. The circuit court correctly refused to vacate one of Berryhill's convictions.

> "The principles of double jeopardy are not violated when an appellant is found guilty of two counts of capital murder arising out of one killing. Stewart v. State, 601 So.2d 491 (Ala.Cr.App. 1992)]; Jackson v. State, 516 So.2d 726 (Ala.Cr.App. 1985..."
>
> ""Appellant was properly indicted and convicted for two separate and distinct capital offenses 'notwithstanding a substantial overlap in the proof offered to establish the crimes,' Iannelli v. United States, 420 U.S. 770, 785, n. 17,95 S.Ct. 1284, 1293, n. 17, 43 L.Ed.2d 616 (1975)."
>
> "'Jackson, 516 So.2d at 763.'
>
> "Stewart v. State, [Ms. 90-415, October 23, 1992]

__So.2d–(Ala.Cr.App. 1992) (return to remand)."

Seritt v. State, 647 So2d 1 (Ala.Cr.App. 1994) (Seritt was convicted on two counts of capital murder for the killing of one person – intentional killing when Seritt had previously been convicted of murder in the preceding 20 years and the intentional killing during the course of first-degree burglary. Seritt was convicted of both counts of capital murder, but received one sentence of life without parole); Powell v. State, 631 So2d289 (Ala.Cr.App. 1993) (two convictions for killing one person during a burglary and robbery upheld); Merriweather v. State, 629 So.2d 77 (Ala.Cr.App. 1993) (convictions for killing one person during a burglary and during a robbery upheld).

III.

Berryhill contends that he was denied effective assistance because trial counsel declined a self-defense instruction and because trial counsel failed to request instructions on other lesser included offenses. The circuit court ruled as follows on this claim.

> "In reviewing the evidence presented, self-defense was inconsistent with defense counsel's theory of the case i.e., [Berryhill] was not there, and he did not do it. Therefore, failure to request a charge on self-defense was not deficient performance of counsel. Although there was some evidence to warrant a charge on manslaughter, trial counsel could have reasonably felt that the evidence was weak and not credible, and that it would have been inconsistent with their theory of defense to argue a lesser included of manslaughter to the jury and at the same time argue he didn't do it. There was simply no evidence to support a jury charge

on criminally negligent homicide. Defense counsel's strategy, on this point, was within the wide range of permissible defense strategy."

C.R. 34.

The circuit court in its written order, explained its reason for rejecting the claim. This reason is supported by the record.

IV.

Berryhill contends that he received ineffective assistance of trial counsel because trial counsel allowed prejudicial evidence of prior bad acts to be admitted into evidence. He also contends that appellate counsel was ineffective for failing to raise this claim on direct appeal. The circuit court ruled as follows on this claim.

> "As to the evidence of bad acts. The whole trial was so permeated with evidence of drugs (the victim was a drug dealer), and the State's theory of the case, which was supported by the evidence , that defendant's motive in breaking in the victim's trailer was to steal marijuana, that any mention of marijuana did not prejudice the petitioner or would not have resulted in a different result."
>
> "The petitioner, himself, brought up LSD, to refute the State's evidence that he left Oklahoma as consciousness of guilt of the murder. He testified that he left Oklahoma because his duffle bag, seized by the police after a traffic stop, contained LSD, and he was afraid it would be found, and he would be prosecuted for possession of LSD."

"The State brought up that the petitioner was charged with driving while suspended in Oklahoma. This evidence was admissible to show the reason for his arrest in Oklahoma, and the inference that he fled Oklahoma because police would discover he was wanted for murder in Alabama."

"A prosecution witness also answered a question in an arguably unresponsive manner, and injected a statement by the petitioner, imputing bad character. The context of the question and answer arose in the questioning of the petitioner's roommate. The two were living together at the time of the crime. The witness was being asked about a 32 caliber pistol that the defendant owned, and a gun in petitioner's possession after the murder, matching the description of a gun stolen from the victim at the time of the murder. "Q: Did Jason say anything about committing a crime any type of crime? A: if he was going to rob a bank he'd go in and let them know he was serious and shoot somebody first or something like that."

"This statement was not admissible to prove the bad character of the petitioner or that he acted in conformance therewith. However, it was admissible to show, plan, scheme, or intent of the petitioner."

"There was also evidence from this same witness that the petitioner explained his possession of the 9mm gun by saying that he got it by breaking into a car. This evidence would be admissible as a false exculpatory statement (exculpatory of the murder)."

"There was also evidence presented that the petitioner went into the victim's home to steal marijuana. This

evidence was admissible to show motive."

"In assessing the performance of trial and appellate counsel, this court finds that counsel's performance was deficient in no respect, and the result of the trial would have been no different had counsel performed as suggested by the petitioner."

C.R. 35-36.

The circuit court, in its written order, explained its reason for rejecting the claim. This reason is supported by the record. Absent a clear abuse of discretion by the trial court, this court will not overturn the trial court's judgment. Hurley v. State, 568 So.2d 359 (Ala.Cr.App. 1990). No abuse of discretion is evident from the record.

For the reasons stated above, the circuit court's denial of Berryhill's Rule 32 petition is affirmed.

AFFIRMED.

Long, P.J., McMillan, Baschab, and Fry, JJ., concur.

APPENDIX C

IN THE CIRCUIT COURT FOR TUSCALOOSA COUNTY, ALABAMA
CASE NO. CC 1993-1562.60

JASON ROGER BERRYHILL

VS

STATE OF ALABAMA

ORDER

This cause came to be heard on Petitioner's Rule 32 Petition.

This issues, raised by the Petitioner, are as follows:

1. The defendant's constitutional right against double jeopardy was violated by the court entering a judgment of guilty of two (2) counts of Capital Murder i.e. Murder during Burglary 1, and Murder during Robbery 1;

2. The defendant should be allowed a new appeal because the counsel on appeal did not have five (5) years of criminal law experience as mandated by Code of Alabama Section 13A-5-54;

3. The defendant received ineffective assistance of trial, and appellate counsel.

The facts are as follows:

The defendant was indicted for two (2) counts of Capital Murder on November 18, 1993. He was convicted of both counts on February 22, 1995, and a judgment of guilty of both counts was entered on the same day. A sentencing hearing was conducted before the Judge on May 1, 1995, and the Petitioner was sentenced to life without parole (1 sentence only).

At trial, the defendant was represented by John Bivens, a trial attorney with over (5) years experience in the active practice of criminal law, and Ginger Buck, a relatively new attorney. The theory of defense was that the defendant was not at the murder scene, and that he did not commit the murder. The Petitioner criticizes trial, and appellate counsel's performance in the following areas:

1. Trial counsel did not request a jury instruction on the lesser included offenses of manslaughter, and criminally negligent homicide;

2. Trial counsel did not request a jury instruction on self defense;

3. Trial counsel allowed the State to go into evidence of other unrelated bad acts of the Petitioner;

4. Finally, appellate counsel failed to raise those issues on appeal, and ineffective assistance of trial counsel. (Ineffective assistance of trial

counsel is waived since not raised on appeal. It is considered here in only as going to the issue of ineffective assistance of appellate counsel).

In reviewing the evidence presented, self defense was inconsistent with defense counsel's theory of the case i.e. he was not there, and he did not do it. Therefore, failure to request a charge on self defense was not deficient performance of counsel. Although there was some evidence to warrant a charge on manslaughter, trial counsel could have reasonably felt that the evidence was weak and not credible, and that it would have been inconsistent with their theory of defense to argue a lesser included of manslaughter to the jury and at the same time argue he didn't do it. There was simply no evidence to support a jury charge on criminally negligent homicide. Defense counsel's strategy, on this point, was within the wide range of permissible defense strategy.

As to the evidence of bad acts. The whole trial was so permeated with evidence of drugs (the victim was a drug dealer), and the State's theory of the case, which was supported by the evidence , that defendant's motive in breaking in the victim's trailer was to steal marijuana, that any mention of marijuana did not prejudice the petitioner or would not have resulted in a different result.

The petitioner, himself, brought up LSD, to refute the State's evidence that he left Oklahoma as consciousness of guilt of the murder. He testified that he left Oklahoma because his duffle bag, seized by the police after a traffic stop, contained LSD, and he was afraid it would be found, and he would be prosecuted for possession of LSD.

The State brought up that the petitioner was charged with driving while suspended in Oklahoma. This evidence was admissible to show the reason for his arrest in Oklahoma, and the inference that he fled Oklahoma because police would discover he was wanted for murder in Alabama.

A prosecution witness also answered a question in an arguably unresponsive manner, and injected a statement by the petitioner, imputing bad character. The context of the question and answer arose in the questioning of the petitioner's roommate. The two were living together at the time of the crime. The witness was being asked about a 32 caliber pistol that the defendant owned, and a gun in petitioner's possession after the murder, matching the description of a gun stolen from the victim at the time of the murder. "Q: Did Jason say anything about committing a crime any type of crime? A: if he was going to rob a bank he'd go in and let them know he was serious and shoot somebody first or something like that."

This statement was not admissible to prove the bad character of the petitioner or that he acted in conformance therewith. However, it was admissible to show, plan, scheme, or intent of the petitioner.

There was also evidence from this same witness that the petitioner explained his possession of the 9mm gun by saying that he got it by breaking into a car. This evidence would be admissible as a false exculpatory statement (exculpatory of the murder).

There was also evidence presented that the petitioner went into the victim's home to steal marijuana. This evidence

was admissible to show motive.

In assessing the performance of trial and appellate counsel, this court finds that counsel's performance was deficient in no respect, and the result of the trial would have been no different had counsel performed as suggested by the petitioner.

As to the petitioner's claim that appellate counsel had less than 5 years experience , this court finds that appellate counsel did have less than 5 years experience. This court could find no case law addressing whether or not 13A-5-54 applies to appellate counsel or whether a violation of that statute automatically carries with it an automatic right to a new appeal.

There is case law holding that there is no presumption of incompetence, of counsel, and this court has already ruled that the petitioner received effective assistance of appellate counsel. The petitioner has failed to prove that he was, in any way, prejudiced by appellate counsel's lack of 5 years experience. This court takes judicial notice of appellate counsel's ability, in that, she was able to prove ineffective assistance of counsel in a murder case around this same time period, and got a murder conviction set aside in a case that had been affirmed on appeal.

The final issue raised, by the petitioner, is double jeopardy. The petitioner claims that his constitutional rights were violated by the court's entry of two (2) convictions for capital murder. All of the cases cited by petitioner are inapplicable to the facts of this case. All cases cited involved juries returning verdicts for lesser included offenses in capital

murder cases. The law applicable to this case is Jackson v. State (516 So 2d 726).

This court in compliance with Jackson v. State entered two (2) guilty judgments, Murder during Robbery, and Murder during Burglary 1, but only one (1) sentence of life without parole.

After carefully considering the petitioner's petition, it is the judgment of the Court that it be overruled and denied in all respects.

ORDERED this the 27th day of December, 1999.

THOMAS S. WILSON
CIRCUIT JUDGE

APPENDIX D

IN THE CIRCUIT COURT OF TUSCALOOSA COUNTY, ALABAMA

STATE OF ALABAMA,)

Petitioner,)

VS.) CASE NO:
CC 93-1562
JASON ROGER BERRYHILL,)

Defendant.)

PETITION PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURES FOR RELIEF FROM JUDGMENT

Petitioner, Jason Roger Berryhill, now incarcerated at the Donaldson Correctional Facility in Bessemer, Alabama, petitions this Court for relief from his sentence of life without parole which was imposed in violation of the United States Constitution and the Constitution and laws of the State of Alabama.

I. PROCEDURAL HISTORY

1. Petitioner was convicted of two counts of Capital Murder, involving a single death, in case number CC-93-1562, in violation of Alabama Code Sections 13A-5-40(4)(1975)

and 13A-5-40(2) (1975) in the Circuit court of Tuscaloosa County, Alabama on February 22, 1995. (T-453).

2. After the penalty phase was held, on February 22, 1995, the jury recommended (by a vote of 12 to 0) that the Petitioner be sentenced to life without parol. (T-452).

3. On May 1, 1995, the Petitioner was sentenced to life without parol by the Honorable Steve Wilson, Circuit Judge.

4. One July 27, 1995 the Petitioner gave written Notice of Appeal to the Alabama Court of Criminal appeals. (T. 469).

5. On August 1, 1995, the Honorable Virginia Buck was appointed by Judge Wilson to "prosecute" the Petitioners' appeal. (T. 469).

6. On April 18, 1997, the Court of Criminal Appeals affirmed the Petitioners' conviction and within 14 days thereof, an Application For Rehearing and a Rule 39 (K) Motion were filed with the Clerk of the Court of Appeals.

7. After the Court of Appeals refused to rehear the matter, a Petition for Writ of Certiorari was filed with the Alabama Supreme Court, which was thereafter denied on November 20, 1998.

II GROUNDS SUPPORTING THE PETITION FOR RELIEF

A. THE TRIAL COURT VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW AND DEPRIVED THE PETITIONER EFFECTIVE ASSISTANCE OF COUNSEL WHEN IT APPOINTED AN ATTORNEY TO REPRESENT THE PETITIONER FOR PURPOSES OF TRIAL AND APPEAL WHO HAD LESS THAN 5 YEARS EXPERIENCE IN THE ACTIVE PRACTICE OF CRIMINAL LAW IN VIOLATION OF ALABAMA CODE SECTION 13A-5-54 (1975) (U.S.C.A., AMENDMENTS 5, 6, 14).

8. Virginia Buck was admitted to practice law in the State of Alabama on September 24, 1993; i.e., two months prior to the Petitioner being indicted for the crime for which he was convicted.

9. Ms. Buck took an active role in the defense of the Petitioner's case; including, but not limited to, conducting direct and cross-examination, objecting to questions propounded by the State, and arguing motions on behalf of the defense. (Entire record).

10. Petitioner alleges that his case was the first jury trial for which Ms. Buck had been

involved. (T-308).

11. Alabama Law is very clear that only experienced counsel is competent for purposes of providing a defense for citizens charged with Capital crimes; viz:

> **"Each person indicted for an offense punishable under the provisions of this article who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years prior experience in the active practice of criminal law. (Acts 1981, No. 81-178, section 16, Alabama Code (1975) 13A-5-54).**

12. Petitioner alleges that Ms. Buck's active participation in the trial of his case, and as sole participant for purposes of appeal, denied him PROCEDURAL DUE PROCESS OF LAW.

13. Petitioner alleges that Ms. Buck was, at the time of her participation, prima facia incompetent to represent the Petitioner, or any citizen for that matter, similarly charged with a Capital offense.

14. Petitioner specifically pleads a denial of PROCEDURAL DUE PROCESS OF LAW as relates to the sole appointment of Ms. Buck for purposes of prosecuting his appeal in the face of Statutorily imposed mandates.

15. Petitioner alleges that he was denied effective assistance of counsel, by virtue of the foregoing, at critical junctures of his trial and on appeal.

16. This procedure deprived the accused effective assistance of counsel in the evaluation, preparation, and presentation of his defense at trial.

III. PETITIONER WAS DENIED HIS RIGHT TO A FAIR, IMPARTIAL, AND REPRESENTATIVE JURY AS GUARANTEED BY THE UNITED STATES CONSTITUTION AND THE CONSTITUTION AND LAWS OF THE STATE OF ALABAMA (U.S. C.A., 5, 6, AND 14)

A. THE TRIAL COURT DENIED THE PETITIONER DUE PROCESS OF LAW AND A FAIR TRIAL BY A JURY OF HIS PEERS WHEN THE JURY POOL WAS MADE UP SOLELY OF THOSE CITIZENS POSSESSING DRIVERS' LICENSES.

17. The grand jury which returned the indictment against the Petitioner, and the jury venire, were selected from a list of licensed drivers in Tuscaloosa County.

18. This procedure produced a grand jury and jury venire which excluded those citizens over the

age of 18 years who lacked the money to own an automobile, consciously objected to operating a motor vehicle, declined to obtain a license, and hence did not have a drivers' license; as well as those individuals who because of minor criminal and/or traffic convictions, did not have a drivers' license.

19. The Circuit Clerk of Tuscaloosa County, Doris Turner, testified (vol. 4, T-58) that the master jury list was comprised only of licensed drivers.

20. Petitioner alleges that it cannot plausibly be contended that the master jury list reflects a fair cross-section of the community since non-licensed drivers, when excluded from the jury panel deprived the accused a jury of his peers.

C. THE PETITIONER WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY, DUE PROCESS OF LAW, AND WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL COURT FAILED TO DECLARE A MISTRIAL WHEN A JUROR STATED BEFORE THE WHOLE OF THE VENIRE THAT THE ACCUSED "LOOKS GUILTY".

21. During the voir dire process, a juror stated to the Petitioner's defense counsel that "he looks guilty" referring to the Petitioner. (Vol. 6, T-517)

22. The counsel for the accused stated to the Court that:

"I think that he poisoned my jury panel."

State's Counsel responded:

Mr. Smith: "I wouldn't object..."

23. The trial judge reserved the right to rule on the matter pending a curative charge. (T-527, Vol. 6).

24. The counsel for the accused failed to receive from the Court a ruling on the requested mistrial. As a result, the Petitioner's counsel not only were ineffective by failing to obtain a mistrial; they failed to preserve the matter for review. As such, Petitioner's counsel were ineffective at trial and on appeal.

IV. PETITIONER WAS DENIED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE PETITIONER'S COUNSEL FAILED TO REQUEST A MISTRIAL WHEN IT WAS DISCLOSED TO THE COURT (MIDWAY THROUGH TRIAL) THAT THE DISTRICT ATTORNEY'S EMPLOYEE WAS A JUROR IN THE CASE.

25. During the voir dire, counsel for the Defendant was ineffective by failing to ask members of the venire whether they knew the District

Attorney or were employees of the same.

26. Midway through the trial of the accused, the District Attorney disclosed to the parties that one of the jury members was under his employ. (Vol. 10, T-1309)

27. Counsel for the Petitioner stated that he had "no problem" with the D.A.'s employ continuing to sit as a juror and would "certainly...not...make any challenge to her." (Vol. 10, T. 1322).

28. Petitioner asserts that it is fundamental and axiomatic to a fair trial that his counsel determine who were relatives, employees, and friends of opposing counsel. Further, that any prospective jurors be free from natural bias and prejudice due to business or personal relationships. In this case, the counsel not only failed to elicit this elementary information, but also failed to question the juror once it was determined that there was, in fact, an employ of the prosecution on the jury.

29. This matter amounts to an absolute breakdown in advocacy. In cannot be rationally argued that a capital defendant should be inspired with confidence, given these facts, of a fair verdict under the circumstanced herein alleged. It can, however, be asserted that there is a grave possibility that the outcome of this case may have been different had the employee of the

D.A. been examined and a mistrial declared. It is absurd to assume that had the juror been asked the question:

> **"Would you not tend, ever so slightly, to lean toward your friend and employer over a complete stranger, the defendant?"**

that the answer would have been in the negative.

V. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS OF LAW AND THE PETITIONER WAS DEPRIVED ON EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE PRIOR BAD ACTS OF THE ACCUSED WERE ALLOWED INTO EVIDENCE, WITHOUT OBJECTION, IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION AND LAWS OF ALABAMA.

30. During the Petitioners trial the State was allowed to present to the jury, character evidence and elicited evidence of the Petitioner's prior bad acts.

31. Specifically, the trial court and the Petitioner's counsel allowed the State to present to the jury the facts that the Petitioner had failed to appear in court (in Oklahoma), had been arrested for driving while suspended and had

no license, and charged with possession of LSD.

32. This evidence had no probative value, yet was allowed to be presented to the jury. Petitioner asserts that this evidence was simply used to prove that the Petitioner was a criminal, and thus, more than likely committed the offense presently charged.

VI THE PETITIONER WAS DENIED DUE PROCESS OF LAW AND WAS DENIED A FAIR ERROR FREE TRIAL WHEN THE TRIAL COURT, IN HIS INITIAL CHARGE TO THE JURY AND PRIOR TO OPENING STATEMENTS, REFERRED TO THE GUILTY PHASE OF THE TRIAL PRIOR TO A CONVICTION. (U.S.C.A. AMENDMENTS 6 and 14)

33. Prior to opening statements, the trial court referred twice to the "guilty phase" of the Petitioner's case prior to conviction. (Vol. 8, T-895, 899).

34. Petitioner asserts that the reference to the guilty phase to a seated jury prior to a conviction prejudiced to the Petitioner's case and compromised his ability to obtain a fair trial.

VII. PETITIONER WAS DENIED A FAIR TRIAL,

DUE PROCESS OF LAW, AND DEPRIVED OF EFFECTING ASSISTANCE OF COUNSEL WHEN OUT OF 37 WITNESSES PROFFERED BY THE STATE 22 WERE EITHER CROSS-EXAMINED BY VIRGINIA BUCK OR NOT CROSS-EXAMINED AT ALL. (U.S.C.A. AMENDMENTS 6, 14)

35. Nine witnesses for the State, namely: Jack McRae, Shawn Hanna, Barry Petree, Dorman Adams, Tommy Stevenson, Roger Moser, Edmond Sexton, Murray Mitchell and Steve Marchant were not asked a single question by the defense. As a result of the breakdown in advocacy, these witnesses testimony and credibility remain uncontradicted.

36. Thirteen (13) witnesses, namely: Robert Pennington, Jim Maddox, Travis Parker, John Steele, Charles Turner, Loyd Baker, Gary Stricker, Richard Leport, Kenneth Glover, Alvin Blocker, Tom Lowe, Charles Turner and John McDuffie were cross-examined by an attorney, Virginia Buck, who was prima facia incompetent by Statutory.authority - to do so. (See Alabama Code (1975) section 13A-5-54).

37. Petitioner asserts that he was denied Procedural Due Process of Law as a result of the foregoing, which directly runs counter to and contravenes legislative intent as noted in the Statute above referred.

38. It cannot be plausibly argued by the State that the attorney, Virginia Buck, played a passive role in the defense of the instant Petitioner. Indeed, Ms. Buck either cross-examined or declined to cross-examine more witnesses than co-counsel, Mr. Bivens. As such, it must be noted that in classifying the relative activity of the attorneys - for all practical purposes - Ms. Buck was the Petitioner's "lead" counsel.

VIII. PETITIONER WAS DENIED COMPETENT COUNSEL FOR PURPOSES OF A CAPITAL APPEAL, DENIED DUE PROCESS OF LAW, AND DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN PROSECUTING HIS APPEAL (U.S.C.A. AMENDMENTS 6, 14).

39. Petitioner was appointed an attorney without the requisite five years of active criminal trial and appeal experience.

40. Counsel for the Petitioner on appeal had only been admitted to practice law two months prior to the Petitioner being indicted for the offenses levied by the State.

41. Petitioner asserts the failure of the trial court to appoint experience counsel violated statutory authority and is PRESUMPTIVELY PREJUDICIAL.

42. And while the Petitioner was not appointed

counsel of sufficient experience in violation of PROCEDURAL DUE PROCESS, the Petitioner does claim actual prejudice by virtue of the facts that certain issues on appeal were not preserved by ineffective counsel on the trial level.

43. Without a preserved record, the matters addressed could not receive judicial review, and affected the Petitioner's right to a competent appeal.

IX. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, DENIED DUE PROCESS OF LAW, AND A TRIAL BY AN IMPARTIAL JURY WHEN TRIAL COUNSEL FAILED TO EXAMINE SEVEN JURORS WHO SAW A WITNESS WHOM, AFTER TESTIFYING, WALKED BEHIND THE PETITIONER POINTED HER FINGER AT THE BACK OF HIS HEAD AND SAID "POW". (U.S.C.A. AMENDMENTS 6, 14)

44. Trial counsel was ineffective for failure to examine the jurors and establish or inquire into the taint caused by the exposure to the prejudicial gesture and comment. (T-2175)

X. PRAYER FOR RELIEF

WHEREFORE, for the above stated and other such reasons as may appear to this Court upon this petition or an amended petition and upon a full evidentiary hearing, Jason

Roger Berryhill respectfully prays that this Court grant him the following relief:

a. Provide him with discovery pursuant to Rule 16 of the Alabama Rules of Criminal Procedure and Ex parte Monk, 557 So. 2d 832 (Ala. 1989);

b. Authorize and conduct a full evidentiary hearing at which proof may be offered concerning the allegations of this petition;

c. Provide Petitioner, who is indigent, with sufficient funds to present witnesses, experts, and other evidence in support of the allegations in his petition;

d. After a full and complete hearing, order the Petitioner be relieved of his unconstitutionally obtained conviction and sentence of life without parole, and

e. Allow him such other further and alternative relief as may seem just, equitable, and proper.

Tommy Drake DRA 012
Attorney for Petitioner
P. O. Box 1165
Cullman, Alabama 35055
256-739-9445

I affirm that the foregoing facts are true and correct to the best of my knowledge and ability.

_____

Jason Roger Berryhill
Petitioner

IN THE CIRCUIT COURT OF TUSCALOOSA COUNTY, ALABAMA

STATE OF ALABAMA,	)	
Petitioner,	)	
VS.	)	
		CASE NO:
JASON ROGER BERRYHILL,	)	**CC 93-1562**
Defendant.	)	

AMENDED PETITION

Comes now the Defendant, Jason Roger Berryhill, by and through attorney, Tommy Drake, and amends his Petition heretofore filed by adding the following:

29. Petitioner alleges that trial counsel were ineffective when they failed to request lesser included charges and an affirmative charge of self defense. (U.S.C.A. 6th Amendment).

30. Petitioner alleges that trial counsel were ineffective, to the prejudice of the Petitioner, when they failed to question the D.A.'s domestic concerning possible bias and then failed to object to said juror remaining on the jury once disclosed.

31. Petitioner alleges that trial and appeal counsel were ineffective, to the prejudice of the Petitioner, when no objection was made to numerous references to the Petitioner's character and no issue of such was presented on appeal.

32. **TRIAL COUNSEL AND APPELLANT COUNSEL WERE INEFFECTIVE, TO THE PREJUDICE OF THE PETITIONER, WHEN THEY FAILED TO RAISE DOUBLE JEOPARDY AT TRIAL AND ON APPEAL.**

A. The Petitioner was charged and convicted of 2 counts of Capital Murder of the same victim.

B. The indictment in this case was "multiplicatus".

C. Trial counsel was deficient prior to and at trial for failing to raise the instant issue.

D. Appellant counsel was deficient for failing to cite trial counsels deficient performance in failing to raise the instant issue, and, for failing to raise Double Jeopardy on Appeal. (See Rollin v. State, 673 So. 2d 812 (Ala. Cr. App. 1995). THIS IS A JURISDICTIONAL CLAIM ALSO.

33. In Coral v. State, 628 So. 2d 954 (Ala. Cr. App. 1992) the Defendant was charged with Capital-Robbery and Capital- Burglary. That court stated:

"It is clear that these two offenses arose out of the same conduct and that his murder conviction constitutes a conviction for the same murder that was an element of the capital of murder-burglary for which he was also convicted. While the Appellant was in fact sentenced only for the greater offense, his murder conviction under Count I cannot stand."

In this case the murder which occurred involved one person. (Compare to McKinney v. State, 511 So. 2d 220 (Ala. 1987). This court, as such, must vacate all but one conviction rendered by the jury as being barred by Double Jeopardy. Simply put, you cannot convict a given defendant for two violations of the same statute. To be sure, see Sisson v. State, 528 So. 2d 1159 (Ala. 1988).

34. By striking from his Petition allegations "C." and sub-section 21-23.

35. By striking from his Petition allegations VI and subsection 17 and 18.

36. By deleting subsection d. Under the Prayer for Relief and inserting in lieu thereof, the

following:

> **"d. After a full and complete hearing, order the Petitioner relieved of his unconstitutionally obtained convictions and discharged as his conviction violates Procedural Due Process of Law;"**

37. Petitioner alleges that trial counsel was ineffective to the prejudice of the Petitioner.

38. Petitioner alleges that appellant counsel was ineffective to the prejudice of the Petitioner.

Tommy Drake DRA 012
Attorney for Petitioner
P. O. Box 457
Cullman, Alabama 35055
256-739-9445

CERTIFICATE OF SERVICE

I certify that I have this the _____ day of September, 1999, served a copy of the above and foregoing Amended Petition on the prosecuting attorney by placing a copy of same in the U.S. Mail, postage paid, and properly addressed.

Tommy Drake

APPENDIX E

TRIAL TRANSCRIPT
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STATE OF ALABAMA
VS.
JASON R. BERRYHILL

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"Now, in determining whether or not the State of Alabama has proven each and every element of these offenses beyond a reasonable doubt, you should consider all of the evidence before you and weight it. After doing so, if you have an abiding conviction of the truth of the charge or charges, then you are convinced beyond a reasonable doubt and it would be your duty to convict the defendant.

Now, the reasonable doubt which would entitle the defendant to an acquittal cannot be a mere fanciful, vague, speculative or conjectural doubt, but must be a doubt which is founded upon a **substantive basis**."

****